Yap Teck Ngian v Yap Hong Lang @ Yap Fong Mei & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–34 OF 2006(C)
ALAUDDIN, NIK HASHIM AND HASHIM YUSOFF FCJJ
8 AUGUST 2007

Civil Procedure — Administration of estates — Letters of administration — Revocation of grant, application for — Citation in contentious probate action — Application made by way of filing of praecipe supported by verifying affidavit — Whether irregular — Whether summons in chambers should be filed — Rules of the High Court 1980 O 72 rr 7, 8(2) & 18, O 32 r 1

Civil Procedure — Administration of estates — Letters of administration — Revocation of grant, application for — Writ not filed — No interlocutory application — No pending cause or matter — Whether summons in chambers correct procedure for issuance of citation —

Sucession — Letters of administration — Revocation of grant — Application for citation — Proper procedure — Citation to bring in grant to be issued prior to writ for revocation — Whether ought to have been commenced by way of summons — Whether sufficient to proceed by way of praecipe supported by verifying affidavit — Rules of the High Court 1980 O 72 r 7

The appellant was the administrator of the estate of his late father. The respondents intended to file a writ to cancel or revoke the grant of the letters of administration given to the appellant. The respondents commenced proceedings by requesting the issuance of a citation as required under O 72 r 8 (2) of the Rules of the High Court 1980 (the 'RHC'). The request was in the form of a praecipe supported by a verifying affidavit. The appellant contended at the trial stage and still contends that the correct procedure for the issuance of a citation is by way of summons in chambers. In support of his contention, the appellant cited O 72 r 18 and O 32 r 1 of the RHC.

Held, dismissing the appeal;

(1) The issuance of a citation prior to the issue of a writ to revoke a grant of letters of administration is by way of a praecipe supported by a verifying affidavit as provided under O 72 r 8(2) of the RHC (see para 6).

(2) A summons in chambers is a process used for interlocutory applications where a writ has already been filed. As no writ had been filed in the present case, there was no pending cause or matter which would justify the filing of a summons in chambers (see para 7); *In re Sin Teck Hong Oil Mills Limited* [1950] 16 MLJ 232 followed.

Obiter:

Where the procedure is specifically provided for in the RHC, it should be complied with as the RHC is made to be obeyed (see para 9).

[Bahasa Malaysia summary

Perayu merupakan pentadbir harta pusaka mendiang bapa beliau. Responden-responden berhasrat untuk memfailkan satu writ untuk membatalkan pemberian surat-surat pentadbiran yang diserahkan kepada perayu. Responden-responden telah memulakan prosiding dengan memohon pengeluaran suatu petikan yang dikehenaki di bawah A 72 k 8(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Permohonan itu adalah dalam bentuk praecipe yang disokong oleh afidavit pengesahan. Perayu menegaskan pada peringkar perbicaraan dan masih menegaskan bahawa prosedur yang betul untuk pengeluaran suatu petikan adalah melalui saman dalam kamar. Untuk menyokong penegasan beliau, perayu telah memetik A 72 k 18 dan A 32 k 1 KMT.

Diputuskan, menolak rayuan tersebut:

(1) Pengeluaran petikan sebelum pengeluaran satu writ untuk membatalkan pemberian surat pentadbiran adalah melalui praecipe yang disokong oleh afidavit pengesahan seperti yang diperuntukkan di bawah A 72 k 8(2) KMT (lihat perenggan 6).

(2) Satu saman dalam kamar adalah satu proses menggunakan permohonan interlokutori di mana satu writ telahpun difailkan. Oleh kerana tiada writ telah difailkan dalam kes semasa, tiada kausa atau perkara yang menunggu penyelesaian yang akan menjustifikasikan pemfailan saman dalam kamar (lihat perenggan 7); *In re Sin Teck Hong Oil Mills Limited* [1950] 16 MLJ 232

Obiter:

Di mana prosedur telah ditetapkan dalam peruntukan KMT, ia patut dipatuhi oleh kerana KMT digubal untuk dipatuhi (lihat perenggan 9).]

Notes

For cases on letters of administration, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 221–226.

For cases on revocation of grant, see 11*Mallal's Digest* (4th Ed, 2005 Reissue) paras 2500–2512.

Cases referred to

Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228 (refd)

Sin Teck Hong Oil Mills Limited, In re [1950] 16 MLJ 232 (folld)

Yap Teck Ngian v Yap Hong Lang @ Yap Fong Mei & Ors [2006] 6 MLJ 607 (refd)

Legislation referred to

Rules of the High Court 1980 O 70 r 4(3), O 71 r 41, O 72 rr 1(2), 2(1), 7, 8(1), (2), 18, O 32 r 1

Appeal from: Civil Appeal No C-02–1039 of 2001 (Court of Appeal, Putrajaya)

K Maniam (Skrine) for the appellant.
Jagjit Singh (Francis Tan with him) (Rosni Francis Tan & Ho) for the respondents.

Nik Hashim FCJ (delivering judgment of the court):

THE QUESTION

[1] On 20 June 2006, this court granted leave to appeal on the following question:

> Whether a citation under O 72 r 7 of the Rules of the High Court 1980 ('the RHC') can be issued against a representative of the deceased holding a grant of a letter of administration merely by filing a praecipe together with an affidavit verifying the facts without filing any formal application by way of a summons in chambers.

BACKGROUND

[2] The appellant, the administrator of the estate of his late father ('the deceased'), was the citee while the respondents, the brothers and sisters of the deceased, were the citors. The appellant had been granted a letter of administration for the estate of the deceased; the respondents, claiming that the said grant of the letter was defective, disclosed that they intended to file a writ against the appellant to cancel or revoke the said grant. For this purpose and as a condition precedent before the said writ could be issued, the citors applied by filing a praecipe together with a verifying affidavit for the issuance of a citation pursuant to r 8(2) of O 72 of the Rules of the High Court 1980 ('the RHC'), which the learned senior assistant registrar ('the SAR') granted on 29 November 2000. On appeal the learned judicial commissioner of the High Court affirmed the SAR's decision and dismissed the appellant's application to set aside and cancel the citation. On appeal to the Court of Appeal, the appellant contended that the citation should be set aside as the citation was not applied by way of a summons as required by r 18 of O 72 of the RHC. The Court of Appeal held that the manner of applying for the citation is by a praecipe supported by a verifying affidavit as required by r 8(2) of O 72 of the RHC and dismissed the appeal (see *Yap Teck Ngian v Yap Hong Lang @ Yap Fong Mei & Ors* [2006] 6 MLJ 607). Hence the question before this court.

[3] Before us, learned counsel for the appellant repeated his submission that an application for citation must be made by way of a summons in chambers. Otherwise, he said it would be an irregularity which cannot be cured and therefore the whole proceeding under the citation would be rendered a nullity and cited O 72 r 18 and O 32 r 1 of the RHC in support of his submission. O 72 r 18 states:

> *Except where these rules otherwise provide*, any application to the Court in a probate cause or matter may be made by summons. (Emphasis added.)

Whereas O 32 r 1 provides:

> Except as provided by Order 25 rule 7, every application in chambers must be made by summons in Form 62.

He also submitted that in neither r 7 nor r 8 of O 72 is there any provision which allows an ex parte application to issue a citation by merely filing a praecipe and affidavit without an application by way of a summons in chambers.

FINDINGS OF THE COURT

[4] With respect, we do not agree with the appellant.

[5] It must be noted that the instant case is a contentious probate action for the revocation of the letter of administration granted to the appellant under O 72 r 1(2) of the RHC. A probate action must be commenced by writ (O 72 r 2(1)). For ease of reference the relevant provisions of the RHC pertaining to the manner of applying for the issue of a citation are now reproduced as follows:

> O 72 r 7 — Citation to bring in grant
>
> In an action for the revocation of the grant of probate of the will, or letters of administration of the estate of a deceased person, a citation against the person to whom the probate or letters of administration, as the case may be, was or were granted requiring him to bring into and leave at the Registry the probate or letters of administration, as the case may be, may be issued on the application of the plaintiff.
>
> O 72 r 8 — Citation
>
> (1) A citation under rule 5 or 7 must be issued out of the Registry and must be settled by the Court before it is issued.
>
> (2) *Before such a citation is issued an affidavit verifying the statements of fact to be made in the citation must be sworn by the person applying for it to be issued*:
>
> Provided that the Court may in special circumstances allow the affidavit to be sworn by that person's solicitor.
>
> (3)...
>
> Without prejudice to Order 62 rule 5, a citation under rule 5 or 7 must be served personally on the person cited.
>
> (5)...
>
> (6)...
>
> (7)...
>
> (8)...
>
> (Emphasis added.)

[6] Thus, it is clear from the above provisions that before any person can file a writ for the revocation of the grant of a letter of administration, a citation against the person to whom the letter was granted must be issued to him requiring him to bring into and leave at the court registry the letter of administration (O 72 r 7). The citation must be settled by the court before it is issued (O 72 r 8(1)). Before a citation is issued pursuant to O 72 r 7 an affidavit verifying the statements of fact to

be made in the citation must be sworn by the person applying for the citation to be issued (O 72 r 8(2)) and that the citation must be served personally on the citee which the citors did in the present case. In the *Administration of Estates Handbook*, Kanesh Sundrum states at p 187 para 192:

> Every probate action must be begun by writ issued out of the Registry of the High Court. The writ must be endorsed with a statement of the nature of the interest of the plaintiff and of the defendant in the estate of the deceased. A writ beginning an action for the revocation of probate or administration can only be issued *after* a citation to bring in grant has been issued or the probate or letters of administration has been lodged in the said registry. (Emphasis added.)

[7] With regard to this case, we agree with learned counsel for the respondents that a summons in chambers is a process used in an interlocutory application which can only be filed in a pending cause or matter. In the present case, the writ for the revocation of the grant of the letter of administration has yet to be filed in court and as such, there is no pending cause or matter in the court in which a summons in chambers could properly issue (see *In re Sin Teck Hong Oil Mills Limited* [1950] 16 MLJ 232).

[8] Further, the use of praecipes as an application to be filed together with an affidavit is nothing new to the RHC. Order 70 r 4(3) is a good example which provides for the manner of applying for the issue of a warrant of arrest in admiralty proceedings. It states: 'A warrant of arrest shall not be issued until the party applying for it has filed a praecipe in Form 157 requesting issue of the warrant together with an affidavit '. See also O 71 r 41 where it provides the procedure of applying for a citation in non-contentious probate proceedings by way of an affidavit sworn by the person issuing the citation.

[9] Likewise, O 72 r 8(2) provides for the manner of applying for a citation by way of an affidavit in contentious probate proceedings. Considering that the manner of application is specifically provided for in the RHC, it is only proper that the r 8(2) procedure is to be complied with as after all, the RHC are made to be obeyed (see *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 (PC)).

[10] Therefore, in our view, the High Court and the Court of Appeal were right in saying that that was the correct procedure provided by r 8(2) of O 72 for the issuance of a citation and that, hence, the application of r 18 is by its own terms excepted.

[11] In the circumstances, we would answer the question posed in the affirmative. The appeal is dismissed with costs to the respondents and order that the deposit be shared equally to account of their taxed costs.

[12] My learned brothers, Alauddin and Hashim Yusoff FCJJ have seen this judgment in draft and have expressed their agreement with it.

Appeal dismissed.

Reported by Daphne Sebastian